Berklee College of Music *and* Berklee Faculty Union, American Federation of Teachers, Local 4412, AFT-MA, AFL–CIO. Case 01–CA–089878

August 26, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND MCFERRAN

On September 20, 2013, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a brief in support of the judge's decision, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

The Respondent operates an undergraduate music school in Boston, Massachusetts. The Berklee Faculty Union has been the exclusive bargaining representative of separate units of full-time and part-time faculty since 1985.

At the time of the events at issue here, the Respondent and the Union were parties to a collective-bargaining agreement effective September 1, 2010, to November 3, 2013. The collective-bargaining agreement gave the Respondent the authority to determine what courses will be offered, which faculty members will teach which courses, and when and where each course will be taught.

The Respondent creates a preliminary schedule for the fall semester in February of each year, and it posts its planned course offerings for the fall in April. Currently enrolled students may choose classes at that time. After the initial April registration period, the Respondent reviews class populations and makes necessary adjustments by canceling or adding courses to meet students' needs and efficiently use classroom space. By August, the Respondent has a good idea of its prospective student population for the fall semester, and the course offerings are further revised at that time and throughout the subsequent add/drop period during the first week of the semester. Courses may be canceled for many reasons throughout this process, including low or zero enrollment.

On August 21, 2012,[1] the Respondent's provost and senior vice president for Academic Affairs, Lawrence Simpson, announced that effective the fall semester, all courses would be subject to a standardized minimum of five students, except for courses that are, by their nature, smaller (such as a trio). Previously, each course had its own minimum, typically three or four students. The five-student minimum was only a guideline, however; some courses were offered in fall 2012 with fewer than five students, and many courses with more than five students were canceled.

On August 23, the Union demanded that the Respondent cease implementing the new standardized minimum until it negotiated with the Union over the impact of that proposed change. The parties met on September 3 and 5. The September 3 meeting was a preliminary discussion between Simpson and Union President Willis Schultz. Among other matters, Simpson and Schultz decided that the parties' attorneys would not attend the September 5 meeting. The September 3 meeting ended with Schultz stating: "We'll pretend that this meeting on the 5th is the meeting that we should have had months ago surrounding these issues." At the September 5 meeting, the Union stated its objections to the new policy, and the Respondent explained the reasons for adopting it. Simpson also stated that as of September 5, 41 courses initially offered for the fall semester had been canceled, compared to 58, 89, 63, and 56 courses canceled in the prior four semesters. The process of adding and canceling courses in response to enrollment changes continued through September 14, the end of the add/drop period for the fall 2012 semester.

Although the judge did not note it, the parties had in the past dealt with the effects of canceling a course through individual negotiations, after the course had been canceled, regarding the impact of the cancellation on the employee's compensation. Michael Scott, who served as union president from 1986 to 2011, testified that "periodically we reached a collegial resolution" through such postimplementation bargaining.

Discussion

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over the effects of its new course population minimum. The judge found that the Respondent "agreed to confer and explain the reasons for taking the action" and did so on September 5, but that no bargaining occurred at that meeting. In support of the latter finding, the judge cited the fact that the parties did not bring their attorneys to the September 5 meeting and Schultz' testimony that neither

[1] All dates are 2012, unless otherwise indicated.

side would bargain in the absence of their attorneys. The judge also found that the Union had no obligation to request bargaining again because the new minimum had already been implemented and was a fait accompli. For the reasons that follow, we disagree with the judge's unfair labor practice finding.

An employer has a duty to bargain over the effects of decisions that are themselves not mandatory subjects of bargaining. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). That duty requires the employer to provide the union with a meaningful opportunity to engage in effects bargaining. Id. at 681–682 ("[B]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time."). In determining whether the requisite meaningful opportunity has been provided, a relevant consideration is "whether the union is afforded an opportunity to bargain 'at a time when it still represented employees upon whom the Company relied for service.'" *Komatsu America Corp.*, 342 NLRB 649, 649 (2004) (quoting *Metropolitan Teletronics Corp.,* 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987)). Once the employer has furnished a meaningful opportunity to bargain, it is incumbent on the union to pursue its bargaining rights. See *First National Maintenance*, 452 U.S. at 682 ("A union, by pursuing such bargaining rights, may achieve valuable concessions . . . ."); see also *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–680 (1975) (dismissing 8(a)(5) allegation where union received notice on July 29 that employer would administer polygraph tests over the course of 6 days beginning July 31, and union never sought bargaining either before or during testing); *American Buslines, Inc.*, 164 NLRB 1055, 1056 (1967) (dismissing 8(a)(5) allegation where employer gave union 1 week's notice of a change and the union "failed to prosecute its right to engage in" bargaining).

Here, the parties met on September 3 and 5 to discuss the new course enrollment minimum. At the September 5 meeting, the Respondent addressed the Union's stated concerns regarding the new minimum and provided information about the number of courses canceled to date under the new policy. The judge found that the Respondent presented the Union with a fait accompli at that meeting because the Respondent refused to rescind the change. Typically, if a Union is presented with a fait accompli, it need not engage in a meaningless effort to turn back the clock and rescind the change. *Tri-Tech Services,* 340 NLRB 894, 895, 903 (2003). But here, it is undisputed that the Respondent was only obligated to engage in effects bargaining, and, at the time of the September 5 meeting, the Union still had a meaningful opportunity to bargain over the effects of the change in course minimums.[2] The primary effects of the changed course minimum would be felt when the Respondent evaluated courses for cancellation in future semesters, and the Union had ample time to bargain over those long-term effects. As for the semester that had already begun, the judge found a single course cancellation that was directly attributable to the change in course minimums. The parties, though, had negotiated to a "collegial resolution" past disputes over the cancellation of courses in postimplementation bargaining. Thus, under all these circumstances, we conclude that the Respondent provided the Union a meaningful opportunity to bargain at a meaningful time. Therefore, the Union was not privileged to discontinue effects bargaining.

Having been furnished the opportunity to bargain, "it was incumbent on the Union to test the Respondent's intent to bargain . . . by engaging in negotiations." *Richmond Times-Dispatch,* 345 NLRB 195, 199 (2005). Although the Union timely requested effects bargaining on August 23, the Union failed thereafter to "prosecute its right to engage in such discussions." *American Buslines*, supra. The Union did not request information concerning the new class size minimum before, during, or after the September 5 meeting, it made no proposals regarding effects, and it did not request any further meetings despite the fact that implementation of the new policy was incomplete until September 14. In these circumstances, we find that the Respondent satisfied its effects bargaining obligation. Id. (union protested employer action and filed charge but failed to enforce its bargaining rights diligently by attempting to persuade employer to alter its decision); *Medicenter, Mid-South Hospital*, supra (unilateral implementation of polygraph testing lawful where union objected to testing but did not request any information or make any proposals before or

[2] The Board's general rule is that effects bargaining must occur before implementation for bargaining to be meaningful. See, e.g., *Woodland Clinic,* 331 NLRB 735, 738 (2000); *Willamette Tug & Barge Co.,* 300 NLRB 282, 283 (1990). That rule typically is necessary because the implementation of a change can itself dramatically reduce, and perhaps eliminate entirely, any leverage the union might otherwise have exercised. In those circumstances, postimplementation bargaining is not meaningful. By contrast, here, for the reasons stated, the union had a meaningful, ongoing opportunity to bargain.

testing and thereby failed to prosecute its right to bargain). Accordingly, we shall dismiss the complaint.[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 26, 2015

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] We do not agree with the judge's finding that the Union was excused from bargaining on September 5 because the Respondent did not bring its attorney to that meeting. The Union may have assumed that the Respondent would not bargain because the parties had negotiated while their attorneys were present in the past, but this is not a valid justification for any failure to request further effects bargaining on and after September 5. *Haddon Craftsmen,* 300 NLRB 789, 790 (1990) (union president's subjective impression of respondent's state of mind "did not excuse the [u]nion from testing the [r]espondent's good faith with a demand to bargain"), revd. denied mem. sub nom. *Graphic Communications Workers Local 97B v. NLRB,* 937 F.2d 597 (3d Cir. 1991). As noted above, the parties had previously engaged in effects bargaining over course cancellations, and there is no evidence that attorneys were present for those negotiations. To the contrary, the only participants in that bargaining identified by former Union President Scott were Scott, the affected instructor, and the Respondent's provost. Moreover, Schultz reasonably led the Respondent to believe that the parties would bargain on September 5 when he informed the Respondent that both parties should treat the September 5 meeting as "the meeting that we should have had months ago surrounding these issues." In addition, implementation of the new policy continued until September 14, and the Union never sought bargaining either on or after September 5. See *Medicenter, Mid-South Hospital*, supra.

In light of our disposition of this case, we do not pass on the judge's findings with regard to whether the new class size minimum was a substantial and material change in terms and conditions of employment, or whether the Union waived its effects-bargaining rights contractually or by its conduct. Finally, for the reasons stated by the judge, we reject the Respondent's contention that this dispute should be deferred to arbitration.

Emily Goldman, Esq., for the Acting General Counsel.
James W. Bucking, Esq. (Foley Hoag LLP), for the Respondent.
Haidee Morris, Esq. (AFTMA), for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Boston, Massachusetts, on April 17 and 18, and May 3, 2013. The Union filed the charge on September 24, 2012, and the Acting General Counsel issued the complaint on December 31, 2012.

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to bargain collectively and in good faith with the Union when it unilaterally made a policy change. The Respondent filed an answer denying the essential allegations of the complaint and raising several defenses.[1]

After the trial, the Acting General Counsel and Respondent filed briefs, which I have read and considered. Based on the entire record in this case, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a private nonprofit coeducational institution of higher learning incorporated under the General Laws of the Commonwealth of Massachusetts with its primary place of business in Boston, Massachusetts. During the calendar year ending December 31, 2012, which is representative of its annual operations, Respondent received gross revenues from all sources (excluding contributions which are, because of limitation by the grantor, not available for use for operating expenses) in excess of $1 million. In conducting its operations during the calendar year ending December 31, 2012, Respondent purchased and received at its Boston campus goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. Accordingly, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent argued that this case should be deferred and referred to arbitration, as art. XI of the collective-bargaining agreement (CBA) currently in effect provides for a grievance/arbitration procedure. (Jt. Exh. 2.) When a party's action presents questions about both the interpretation of a CBA and legal obligations under the Act, the Board will frequently defer to the arbitration procedures contained in the parties' CBA. *Collyer Insulated Wire,* 192 NLRB 837 (1971), and *United Technologies Corp.,* 268 NLRB 557 (1984). However, there is no alleged breach or misapplication of the contract; nor is there a dispute as to the interpretation of any portion of the contract, as the terms of the CBA are clear. It is silent as to the matters at issue. Only statutory obligations under the Act are in dispute. Therefore, it is not appropriate to refer this dispute to arbitration.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

Background

Respondent, Berklee College of Music, located in Boston, Massachusetts,[2] was founded in 1945 as a private nonprofit coeducational undergraduate institution of higher learning, focusing on contemporary music. (Transcript (Tr.) 325.) In addition to instruction in music, such as lessons in voice, ear, harmony, and instruments, the College provides courses on the practical or business aspects of the music industry. (Tr. 326, 327–328.) The school attracts students from around the globe.

Lawrence Simpson serves as both provost and senior vice president for Academic Affairs. His staff includes Jay Kennedy, vice provost and vice president for Academic Affairs; Rob Rose, vice president for Special Programs; Rich Vigdor, director of Academic Budgeting and Administration; and Jeanine Cowen, vice president for Curriculum and Program Innovation. (Tr. 327.) He also oversees the three academic divisions, each led by a dean: Professional Performance (Matt Marvuglio), Professional Education (Darla Hanley), and Professional Writing and Music Technology (Kari Juusela). The deans are responsible for the 37 departmental chairs and assistant chairs in their respective divisions. (Tr. 326.)

The Collective-Bargaining Agreement

The faculty is unionized. The Berklee Faculty Union has been the exclusive bargaining representative of the units since 1985. The most recent collective-bargaining agreement (CBA) between the parties is effective for the period September 1, 2010, to November 3, 2013. (Joint Exhibit (Jt. Exh.) 2.) According to the CBA, the Union consists of two units: a full-time and a part-time unit.[3]

The full-time unit includes all 9-month salaried teaching faculty employed by Berklee College of Music at its Boston, Massachusetts campus. Those faculty members' salary levels depend on their rank (as professor, associate professor, assistant professor, or instructor), and they receive full health, dental, and 403(b) benefits. (Jt. Exh. 2 at 50–66; Tr. 351.) Full-time faculty are required to schedule office hours as well as attend weekly department meetings and perform "Service to the College" assignments. (Jt. Exh. 2 at 40, 41.)

The part-time unit includes all hourly teaching faculty employed during the academic year by Berklee College of Music at its Boston, Massachusetts campus. They have either a 1-year contract or a 3-year contract. Those on the 1-year contract teach on an as-needed basis. They have no salary guarantees and are paid only for the teaching units credited for classes they teach, as well as for office hours and weekly department meetings. (Jt. Exh. 2 at 1, 45–46.) They may be eligible for partial health benefits. Those on a 3-year contract are guaranteed a minimum of 13.5 teaching units per semester, as well as full benefits, and are paid for office hours and department meetings. (Jt. Exh. 2 at 34; Tr. 51, 350.)

Part-time faculty are not guaranteed employment for any subsequent semester, except as provided in the contract. For example, a part-time faculty member who has taught 27 or more teaching units per academic year for 3 consecutive academic years (and has received satisfactory performance evaluations each such year) will receive a contract to teach 27 or more teaching units per academic year for the next 3 consecutive academic years. Those 3-year contracts will continue to be renewed provided the faculty member maintains a teaching schedule of 27 or more teaching units per academic year. (Jt. Exh. 2 at 14, 21.)

Faculty workload is calculated according to weighted teaching units. Classes are weighted as follows. Classes such as instrument lessons, where there is no outside work or preparation, are paid 1 teaching unit per hour. If there is some but limited outside work, the faculty member is paid 1.18 teaching units per hour. However, if there is a great deal of preparation required as well as time spent grading, such as for lecture classes, the faculty member is paid 1.25 teaching units per hour. (Jt. Exh. 2 at 38; Tr. 89–90.)

The CBA covers faculty working conditions, including the maximum number of consecutive hours per day an individual can teach, and references maximum student enrollment for classes. (Jt. Exh. 2 at 35–37.) However, the college determines what courses will be offered; what faculty member will teach what course, regardless of the instructor's preferences or specialty; when the course will be taught; and where it will be taught. (Jt. Exh. 2 at 35, 38, 44, 46.)

The CBA contains a "Management Rights" clause, article XXXIV:

> A. All management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, shall remain vested exclusively in the Employer. It is expressly recognized that such rights, powers, authority and functions include, but are by no means whatever limited to, the full and exclusive control, management and operation of its business and its affairs, including the determination of the extent of its activities, business to be transacted, work to be performed, location of its offices and places of business and equipment to be utilized. The Employer and the Union agree that the above statement of management rights is for illustrative purposes only and is not to be construed or interpreted so as to exclude those prerogatives not mentioned which are inherent to management, except insofar as expressly and specifically limited by the provisions of this Agreement.
>
> B. This Article applies to both full-time and part-time faculty as described at Article I.

(Jt. Exh. 2 at 64.)

The CBA includes article XXXVII, "Waiver of Right," at article XXXVII:

> A. The failure by either party to insist in any one situation upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the Employer or the Union to future performance of any such terms or provisions, and the obligation

[2] There is also a satellite campus in Valencia, Spain.

[3] Of the roughly 580 faculty members, approximately 40 percent are full time and 60 percent are part time. (Tr. 72).

> of the parties to such future performance shall continue. It is understood that neither party gives up the right to argue to prove the assistance [sic] of a past practice.
>
> B. This Article applies to both full-time and part-time faculty as described in Article I.

(Jt. Exh. 2 at 67.)

It also contains an integration clause, "Pre-Existing Rights, Privileges or Benefits," article XXXVIII:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are fully and exclusively set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement and such expression is all-inclusive. This Agreement constitutes the entire agreement between the parties and concludes collective bargaining for its terms, subject only to a mutual agreement to amend or supplement this Agreement.

(Jt. Exh. 2 at 68.)

Course Offerings

At the present time, the college offers 12 majors and the course catalog includes over 1200 courses with 2600 sections. (Tr. 329.) The college's course catalog is developed by the Curriculum Committee, which is headed by Jeanine Cowen, vice president for Curriculum and Program Innovation. Various members of the faculty, administration officials, and students serve on the committee, including the three deans. (Tr. 250.)

The course offering list in the college catalog is reviewed annually by the curriculum committee. Some courses are eliminated, some are added, and others are changed. (Tr. 230–231; R. Exh. 4.) New courses are usually proposed by faculty; they have to be approved by the department chair and division dean prior to submission to the committee, that submits its recommendations to the provost. (Tr. 252–253, 259, 328, 330.) A course is deleted from the catalog for a number of reasons: it is no longer current; the course content has been subsumed in another course; the faculty member who taught it is no longer at the college; the course has been replaced with another; it was never run due to not being populated (reflecting no student interest); or it was never scheduled. (Tr. 253–254, 255–256; R. Exhs. 1, 2.) Course proposals are due by November 1 for the following fall. The committee begins its work at that time, determining which classes will be offered the following year. Those decisions are constantly reviewed and may be changed throughout the year, as circumstances dictate. (Tr. 257, 276.)

In February, the Academic Scheduling team, in consultation with the chairs, creates a preliminary schedule for the fall semester, depending on the needs of the students, the students' interests (including their majors), faculty preferences and availability, and classroom availability. (Tr. 250, 274–275, 278–279.)

Course offerings are posted in April for the fall semester. (Tr. 276–277.) Currently-enrolled students may sign up at that time, although changes may still be made to the course offerings, for a variety of reasons.[4] (Tr. 283, 288.)

After the initial April registration period, the department chairs review the class populations and make whatever adjustments are necessary, cancelling some classes and adding others, so that students' needs are met and faculty and classroom space are used most efficiently. (Tr. 279–282.)

In August, the college has a good idea what the student population will be in September. (Tr. 283.) By that time, students have registered, so there will be few additional changes. The chairs and the committee assess the schedule again and make additional revisions, such as cancelling classes that are not going to be viable due to low population or adding needed classes. (Tr. 283–284,) Classes may be canceled any time up to the end of the drop/add period (the end of the first week of classes).[5] (Tr. 289, 293.) Even classes that are reasonably well populated may be cancelled if, for example, the instructor was needed to teach another class. (Tr. 289.)

The college established maximum and minimum numbers of students for each class, based on the nature of the class, so the students would receive the greatest pedagogical benefit. (Tr. 261–262.) These numbers were included in all new course proposals presented to the curriculum committee. (Tr. 217, 230, 261.) However, maximums and minimums were treated differently. Maximum class size is referenced in the CBA. (Jt. Exh. 2 at 35.) The CBA does not specify the maximum size of each class but states that those maximums are determined by the senior vice president for academic affairs with input from the faculty; that occurs when a proposed course is added to the catalog. Article XXIV(C) provides that no class may be assigned more than 10 percent above that maximum size without the prior approval of the affected faculty member. In general, smaller elective courses had a maximum class size of 8–10 students; core courses, and larger electives had a maximum class size of 15–19 students. (See GC Exh.16; Tr. 177, 268.)

The CBA is silent as to minimum class sizes. Cowen testified that, although each class had a set minimum, they had ranged from 1 (for directed study or lessons) to 10. (Tr. 268.) Further, they were flexible in application; they were not re-

[4] Incoming freshmen do not select their own classes but are assigned to classes by the college. (Tr. 278.)

[5] Last minute changes to the number of registrants for a class create a "snowball effect." When a student registers for a different class, leaving an opening in the class s/he was in, that may be filled by another student who concurrently drops a class s/he had been in, leaving that seat open. (Tr. 284, 285.) Additionally, incoming students are tested and auditioned in September to determine their skill level, and to ensure that they are placed in appropriate classes; those results can also affect the number of students in a particular class. (Tr. 278–279, 286–288.) Also, some students fail to register for school, dropping all classes. (Tr. 285, 291, 292–293.)

quired to be met in order to run a class, but were presumed optimal numbers.[6] (Tr. 295–296, 301, 394.)

During Cowen's tenure, the committee had been carefully reviewing the minimums, and had begun applying the following general standard: the minimum would be 33–35 percent of the maximum number of students for the class. (Tr. 233–234.) However, those numbers were not strictly adhered to when deciding whether to cancel a class; exceptions could be and frequently were made.[7] Classes were often conducted despite having fewer than the minimum number of students, normally three or four. (Tr. 54, 60–62, 72–74, 260; R. Exhs. 3, 4.) Indeed, some ran with but one student, even if it were not an individual instruction class such as instrument lessons. (Tr. 74, 417–418.) Classes were run below the minimums in instances such as when the class was required for graduation, or was a prerequisite for other sequential classes, or the class was only offered periodically and the students may not have another opportunity to take it; or the class may still be viable despite not meeting the minimum; or there were few individuals qualified to take the class; or it was a new prototype class that was being "piloted." (Tr. 56, 59, 264, 295–296, 300–301; GC Exh. 3.) Cowen testified that most classes, perhaps 85–90 percent, routinely run with well over the minimum number of students, closer to the maximum number. (Tr. 297.)

Change to Course Population Minimums

Changes to course populations were occasionally made when a proposal for such was submitted to the committee. Further, in recent years, the committee had taken the initiative to review course populations when changes to a class were proposed that did not involve minimums, in order to ensure that they were appropriately set. (Tr. 265–266.) They especially scrutinized courses that were similar in nature. (Tr. 267.)[8] However, there had been no broad, overall review of course population minimums. (Tr. 272.) In May 2011, the curriculum committee unanimously recommended to the Senior Vice President for Academic Affairs and Provost Simpson that the required minimums be changed to 33–35 percent of the established maximum course populations, thereby increasing many of them. (GC Exh. 22.) The goal was to have more standardized minimum course populations for "like" classes, with most minimums at five or more students. (Tr. 233–234.) Cowen explained that, over time, as new courses were added to the catalog, the minimum numbers were not comparable to the numbers set for similar older courses already in the catalog. (Tr. 267, 273.) The committee felt there should be a minimum of five or more students whenever possible, except for classes that were, by their nature, smaller, such as a trio, and that minimums of three made "no sense" other than in those limited situations. Cowen explained that the committee discussed efficacy of student learning and the student learning experience, and the benefit of diversity of opinions in reaching the minimum of five. (Tr. 235–236.)

Simpson accepted the recommendation to increase the course population minimums.[9] He testified that he wanted to create uniform standards for the courses. (Tr. 335, 395.) The minimums were developed by the curriculum committee with the deans. He considered those minimums a guide that add structure, but are important for the students' need for diversity of experience and to introduce discipline into the curriculum. (Tr. 334, 335.) In addition, he was concerned about the premium on space needed to conduct classes, and appropriate space for each class. He corroborated the other witnesses' testimony that classes were run and continue to be run although the registration is below the course population minimums. (Tr. 334.)

The changed course population minimums were not published in the spring of 2011, and no action was taken at that time. Cowen testified this was because the classes for the fall of 2011 had already been determined, and the curriculum for spring 2012 was well underway, so fall 2012 was the earliest the new policy could be implemented. (Tr. 297–298.) Cowen testified that the change in minimum course populations was not announced, that course minimums had never been announced. (Tr. 298.) Cowen testified that the course population minimums were "just a framework. It's a bar that makes our administration of courses just a little bit easier to gauge . . . [I]t gives us real data as to what the decisions are that we're making, rather than, you know, intuition and anecdote." (Tr. 295.) "[I]t's an administrative tool. . . . We have to be able to make determinations and be using this data to do that." (Tr. 296.) Further, "it's just an administrative detail . . . it's always been a tool that has been used with Academic Scheduling and the chairs. I send out big notices to chairs frequently about important things. It was seen as a tool to help us manage our schedule and nothing more . . . (T)here was no expected impact. There was no material change in the way we were going to do our operations." (Tr. 298.)

Likewise, Simpson testified that he did not notify the Union of the new course population minimums because he did not consider it a change, but "business as usual," an "administrative detail." (Tr. 337.) Minimum course populations are not covered by the contract, and determining those minimums is a management right. Since he did not consider there to be any substantial change, there was no need to notify the Union. (Tr. 298, 312, 337.) Further, he did not believe that faculty were negatively impacted. The minimums were objective standards; however, they were not "set in concrete." (Tr. 334, 397.) Simpson explained that the deans are responsible for implementing the policy in communication with their chairs.

Cowen testified that the curriculum committee did not consider the budget when making its decisions; the role of the committee was to consider pedagogy and the student experi-

[6] Those minimums did not apply to individual instruction classes or self-defined classes, such as trios or quartets. (Tr. 265–266.) Occasionally, those classes ran with fewer students than defined, since the instructor could play the missing instrument.

[7] GC Exh. 23 reflects the number of students enrolled in all classes that were canceled in the 2010/2011 and 2011/2012 academic years. Most had two or fewer students enrolled.

[8] In 2010, the Liberal Arts chair had requested that the minimums and maximums for all courses in that department be standardized (the "LART sweep"). (Tr. 271–272.)

[9] The Acting General Counsel did not subpoena records of the new course population minimums so these numbers are not included in this record. (Tr. 218.)

ence. (Tr. 235–236, 261–262, 298–299.) Nor did the committee discuss the potential impact on part-time faculty.[10] (Tr. 312.)

The committee has deans, chairs, faculty, and students as members but it does not include a representative of the Union. The committee does not consult the Union about its decisions, and specifically did not consult the Union regarding the change to the minimum course populations. (Tr. 312–313.)

On August 21, 2012, the change to minimum course populations was announced by Simpson, to be implemented that fall. Simpson forwarded a spreadsheet prepared by the curriculum committee to the three deans listing the new minimums for each course.[11] (Tr. 387–389, 394.) The deans advised their department chairs, at least some of whom advised their faculty. Individual class enrollments in their departments were reviewed and recommendations could be made whether to cancel any classes based on the new minimums. (Tr. 388–389; GC Exh. 2.)

Simpson's Initiative to Reduce the Number of Elective Courses

As provost, Simpson was concerned about the large number of electives in the course catalog, that he felt were not added in an efficient and disciplined manner. Approximately 200 new electives had been added between 2008 and 2010. (Tr. 329–330.) He also felt some of the courses were being run too frequently. This created a challenge when scheduling classes, as there was a premium on space, and there could be difficulty assigning faculty to all those classes. In order to take better control of the course offerings, he set a goal of reducing the number of electives by 10 percent. (Tr. 331.) They would not all necessarily be eliminated from the catalog, but could be offered less frequently. (Tr. 420.) Class population over time would be reviewed, to determine the level of student interest in those classes, that would assist in deciding whether to cancel a class.[12]

Simpson testified that he believed that development of the curriculum must be disciplined, and that electives should be given particularly close review. (Tr. 330.) He felt the school's catalog included too many electives that were not justified by student interest. (Tr. 330, 331, 333.) If students were not signing up for courses, that indicated there was insufficient interest to offer the class, or to offer it so frequently. This was important because classroom space was at a premium; it could be challenging to schedule classes appropriately. Simpson wanted to reduce the number of electives offered by 10 percent, down to a total of about 1100. Those classes could be removed from the catalog but, more likely, simply offered less frequently. (Tr. 332.) He met with the deans and vice presidents in Academic Affairs, to discuss which of the 1200 classes should not be offered that semester. (Tr. 332, 334). He insisted that the curriculum committee's recommendation to increase the course minimums was "absolutely not" a budgetary issue and was unrelated to this initiative. (Tr. 343, 335.) Rather, he wanted to introduce more discipline, to better control the classes offered. As Cowen testified, Simpson stated that factors considered included whether a student needed the course to graduate, or the student had a program need for the class. (Tr. 332–333.)

Faculty Responses to the Changes

On receiving notice of Simpson's initiative to reduce electives, Kenn Brass, chair of the Professional Music Department, sent an email to his department faculty members on August 17, 2012, advising them of some anticipated changes. (GC Exh. 4.) He stated, in pertinent part:

> I write this email with important information regarding course scheduling for the ensuing Fall 2012 semester. Unfortunately, a mandate from Academic Affairs has made it likely that schedules will have to be modified for a good number of faculty.
>
> Without going into too many particulars, following is what we are looking at:
>
> 1) Part-time faculty who are not on a 3-year contract may lose courses/teaching hours.
>
> . . . .
>
> 5) Underpopulated sections (below the minimum) will be cancelled for both part-time and full-time faculty.
>
> That is all the information I am able to share for now. Individual contact will be forthcoming to inform you of how these changes will actually affect your Fall schedules as that information becomes available. . . .

Anne Peckham, chair of the Voice Department, sent an email to Joyce Lucia, a part-time associate professor, on August 17, 2012, regarding her fall schedule.[13] (GC Exh. 32.) It stated, in part:

> Due to strict budget cuts enacted throughout the College of Music, Matt Marvuglio[14] has asked Chairs to cut underpopulated classes in all PPD course offerings for Fall 2012. Your classes, PSVC 131-001, PSVC 231-001, PSVC 232-001, are being removed from your schedule this Fall. . . .

Lucia responded, in part:

[10] The college attempted to find replacement classes for faculty members whose classes were cancelled. In most, but not all, instances, those efforts were successful. (Tr. 406.)

[11] Simpson testified that the change to course population minimums was not new information to the deans, since there had been ongoing discussions about the issue, especially through the curriculum committee, of which the deans were members. (Tr. 389.) However, Dean Juusela was the only dean present at the May 31, 2011 meeting when the policy change was recommended. (GC Exh. 22.)

[12] Class population is distinct from minimum course populations; it is simply the number of students enrolled each semester. A decision could be made not to offer a class for the semester or drop it from the catalog even if it met the minimums, if it was discovered that, over time, it had low populations and therefore little student interest. (Tr. 415.) Dean Marvuglio's email response to Cecere, that his class was canceled for "low population" despite having five students registered, is an example. (GC Exh. 17, 18.)

[13] See R. Exh.10 for the college's record of student enrollment (2) in her American Diction class when it was canceled. (Tr. 304–305.) The class had had a minimum of 4 in 2011. (Tr. 307; R. Exh. 11.)

[14] Dean of the Professional Performance Division.

> [F]or the PSVC 131-001, I simply need to move one person from the other section, in order to populate the class of 3. As far as PSVC 232—I understand that with a population of Zero, it would be cut. Lastly, Sean told me that diction would probably populate since the Fall semester had so many incoming voice principals. . . .”

Peckham replied:

> I’m sorry, but the decision has been made and is final. The classes are cancelled. These are college-wide changes made in conjunction with Larry Simpson, all the Deans and all the Chairs.

Lucia had been scheduled to teach four classes (LHUM-100, PSVC 231-100, PSVC 131-001, and PSVC 232-001). As of August 17, the date the three classes were canceled, PSVC 231-100 had three students registered; PSVC 131-001 had two; and PSVC 232-001 had none.[15] (GC Exh. 25, pp. 3, 5.) She was not offered replacement classes for any of the three Voice classes she lost. (Tr. 450.) Therefore, she contacted Michael Mason, assistant chair of the Liberal Arts Department, seeking a replacement class. She obtained a second LHUM-100 class (Artistry, Creativity, and Inquiry Seminar). (Tr. 450.) She testified that is a much more demanding class than the Voice classes that were canceled. (Tr. 451–454.)

Subsequently, shortly after Simpson’s August 21 notice to the deans of the change in course population minimums, the following emails were sent.

Darla Hanley, dean of the Professional Education Division, sent an email to her department chairs on August 21, 2012. (GC Exh.16.) Attached was a list of the courses and number of registrants. That attachment indicated prior minimums of three to five students for most classes, and new minimums of five to seven students.

> I learned today that course minimums have been increased for the fall semester (attached). Please review individual class enrollments for your department—now in light of these adjustments—and let me know your thoughts about canceling any sections. We are still striving to meet the requested budget reductions. . . .

Suzanne Hanser, chair of the Music Therapy Department, then sent an email to her department faculty on August 29, 2012, advising them of important policy changes, and attaching a copy of “Academic Policy Changes,” dated August 28, 2012. She indicated that no classes in that department were affected that semester. (GC Exh. 15.)

On August 21, 2012, Brass sent another email advising his department that the minimum number of registrants had been raised for certain classes. (GC Exh. 5.)

> Well, another bomb has been dropped—MINIMUM ENROLLMENT HAS BEEN RAISED TO SEVEN (7) FOR NEARLY ALL COURSES! What this now means is that courses are in jeopardy that were not before.
>
> Having only learned about this a couple of hours ago, I do not know where all the Pro Music courses stand. Contact will be made with you tomorrow as I gather further information.

On August 22, 2012, Brass sent an email to Tom Stein, a professor in the Professional Music Department. (GC Exh. 6.) It read, in pertinent part:

> . . . Further, this situation is an ever-moving target. I am not sure if you read my latest email from last night, but a new wrinkle has been added. Minimum population for nearly all classroom instruction has been raised to seven (7)! So, many more courses are in jeopardy than we knew of just a day ago. It also means that it will be the part-timers who will suffer as the college looks to assign full-timers to the max. I truly believe some part-timers could even lose their total teaching schedules less than three weeks before classes begin!

Brass sent an email to Linda Gorham, a part-time professor in the Professional Music , on August 23, 2012, regarding one of her classes, “Subject: Bad News!”[16] (GC Exh. 29.)

> I am so sorry, but it looks as if we will not be able to offer the PM-320 course for the Fall. This of course is due to the recent change that raised course minimum populations from 3 to 7. . . .

Gorham’s PM-320 class, Investment Principles for Professional Musicians, had previously had a minimum course population of three.[17] There had been three students registered for the class as of April 2012, when it was initially canceled.[18] It was reinstated but those three students did not re-register for it. Another three students were registered in August when it was finally canceled. (GC Exhs. 27–29; R. Exh. 12; Tr. 207–208, 241–242, 309.) Cowen testified that minimum course population was not the reason for cancelling that class but she could not explain why Gorham’s class was canceled.[19]

Brass testified that he misspoke in his emails, regarding cancelling classes for not meeting the minimum populations. He said that, in fact, he did not know how the new policy was being implemented. (Tr. 461.) He noted that underpopulated courses continue to be run if a student needs it or it is a popular class. (Tr. 461–462.)

Gorham was not offered a replacement class. However, on August 28, Michael Mason, assistant chair of the Liberal Arts

[15] Brass testified that the course had historically low populations but had been “shored up” in the past. (Tr. 460.) Lucia testified that had been accomplished by moving students from one section to another. (Tr. 448.)

[16] See R. Exh. 12 for the college’s records of her course cancellations for fall 2012. (Tr. 309.)

[17] Gorham testified that her normal schedule is to teach one section of PM-320 and three sections of PM-310, Financial Management for Musicians per semester. (Tr. 429.)

[18] Gorham explained that it appeared the class was canceled in April due to a clerical error; a prototype class that she had was supposed to be canceled. (Tr. 432–433.)

[19] Cowen thought perhaps it was canceled because Gorham was qualified to teach a core class (LHUM-100 and LHUM-400), but this was speculation on her part and, in fact, is incorrect. (Tr. 205, 208–209; GC Exh. 29.) She testified that Gorham was requested to teach a section of the core class at each level, LHUM-100 and LHUM-400 but that is not supported by the evidence. (Tr. 205, 290–291, 459.) She then conceded that she did not know the details of the replacement class assignment. (Tr. 205–206.)

Department, sent an email to a group of 18 faculty members, including Gorham, advising that two sections of LHUM-400, Professional Development Seminar, were available. (GC Exh. 30; Tr. 290.) Initially, she offered to take one of the classes, but withdrew once she realized she had misread the posting, thinking it was LHUM-100 (Artistry, Creativity, and Inquiry Seminar) for incoming students, rather than a sixth semester professional planning course for musicians. She explained that, as a financial planner rather than a musician, she did not feel well qualified to teach LHUM-400 despite having taken training to teach that class. (Tr. 411, 435–437).[20] She discussed her reluctance to teach the LHUM-400 class with Brass and the possibility of teaching LHUM-100 at some future point in time. (Tr. 436, 459.)

Ron Savage, chair of the Ensemble Department,[21] sent an email to the Ensemble faculty on September 4, 2012, advising them of his knowledge of the situation. (GC Exh. 7.) Savage's email read, in pertinent part:

> A number of you have contacted Sean and me about class cancellation concerns and the sudden change in ensemble population minimums.
>
> As of today Tuesday 9/4/2012 NO ensembles, PS courses or Harmonic Consideration classes have been cancelled and the Dean has been supportive of keeping these open until the end of placement. At the end of placement, low populated classes will be cancelled as they have been in the past.
>
> There have been changes to the minimum populations in a small number of classes. 17 (ensembles and PS courses) in total. These changes mostly affect the big bands and choirs moving from a minimum population of 4 to a minimum of 7. Several small band ensembles changed from a minimum of 4 to 5 and PS courses changed from a minimum of 4 to 7.
>
> . . . .
>
> At the end of placement before cancelling low populated ensembles, I will first look at the functionality of the instrumentation of said band before making a final decision to cancel.

Allan Chase, chair of the Ear Training Department,[22] sent an email to his department faculty on September 4, 2012. (GC Exh. 2.) Among other things, he noted:

> Late this summer, some changes have been instituted to help Academic Affairs meet its budget. Chairs and leadership discussed these in late summer and the details have just become available. Most of these changes will have no impact on Ear Training classes or faculty.
>
> One change is in the **minimum number of students per section**. Core classes and the larger electives with maximum class sizes of 15 to 18 now have a minimum population of 7. Electives whose maximum population is 8 or 10 (PFET classes, for example), now have a minimum of 4. Classes whose maximum is 12 (a few electives) have a minimum of 5. In the past, the minimums were 3 for older courses, and 5 for some of the more recently created electives.
>
> In Ear Training, we've had only two or three sections run per semester that would be affected by this change of minimums, mostly in specialized electives. I can't be 100% sure until the numbers are final, but at present, I don't expect anyone in Ear Training to lose teaching hours due to these higher minimums. We're watching enrollments closely each day to try to avoid any loss of classes for students and faculty. . . .

Union Response to the Changes

The union president is Willis (Jackson) Schultz. Schultz is a professor in Jazz Composition and an adjunct professor in several other departments. Michael Scott was the past union president[23] and is a professor in the Harmony Department. Both were on the union bargaining teams that negotiated the current and all prior contracts with Respondent.

Both testified that, at least since 1978, the college's minimum course populations were three to four students. (Tr. 60–62, 65, 72.) Nonetheless, classes often ran with fewer than the minimum number of students enrolled. (Tr. 74.) Both Schultz and Scott have had informal meetings over the years with the various provosts, attempting to informally resolve disputes, including those arising from cancellation of courses. (Tr. 61–62, 65.)

Schultz became aware of the various policy changes when various faculty members forwarded to him emails they had received from their chairs. (Tr. 76, 78–80, 97–98; GC Exhs. 2, 4, 5, 6, 7.) He discussed with Scott the changes in minimum course populations. They were concerned because it would result in classes being cancelled and would affect some part-time instructors. (Tr. 88, 89, 91.)

On August 23, 2012, Schultz sent an email to Simpson requesting that the parties engage in collective bargaining. (GC Exh. 8.) While he objected to a number of the new unilateral changes including cancelling classes earlier than had been done in the past, he specifically noted his concerns about the new policy regarding minimum course populations.

> . . . . It has also come to our attention that the College has suddenly changed the class population minimums in various departments across the College. . . . The College has neither given the Union notice nor offered to negotiate about the impact of these changes. This is to demand that the College cease implementation of these substantial changes until you consult and negotiate with us over the impact of these or any proposed changes on the employment of our faculty bargaining unit members.

Simpson did not respond directly to the bargaining request, but suggested that they "sit down at your earliest convenience after Labor Day to discuss these matters." (GC Exh. 8.)

[20] Respondent argued that Gorham could have taught the class, and therefore was not adversely affected by the cancellation of her original class. However, while Gorham did withdraw from consideration, the Respondent did not establish that Gorham would have been assigned the class in any event, as 17 other instructors received that notice as well.

[21] In the Professional Performance Division.

[22] Also in the Professional Performance Division.

[23] From 1986 to 2011. (Tr. 52.)

Schultz replied that such a delay was not acceptable, as follows. (GC Exh. 9.)

> A meeting after Labor Day may work for you but it doesn't work for me and the many faculty potentially affected by this unilateral change in working conditions. While you are enjoying your time away from the College, many of our faculty now can't, worrying about loosing [sic] teaching hours, their health benefits, and even their jobs. If you can agree to the demand that the College will cease implementation of these substantial changes as stated in my first email, then our meeting can happen as you suggested, after Labor Day. Otherwise I'm free tomorrow.

Simpson did not reply by email. The two spoke by telephone the next day, August 25, 2012, following which Schultz sent an email to the union executive committee regarding the discussion. (Tr. 84–85, GC Exh. 10.)

> Hi Gang. I just got off the phone with Larry and I am very frustrated. It was a long conversation but I will narrow the focus here. He agreed that they screw [sic] up and should have brought the union in before implementing these changes. Sorry! He tried to assure me that they didn't deliberately wait till [sic] everyone was off campus but I wouldn't hear of it. He said no one is loosing [sic] their job when in fact, he just hired some new faculty to add to our ranks. He said that nothing was happening with regard to implementing these changes because everyone was away to which I replied "then that means you agree to the union's demand to cease the implementation of these substantial changes." He said I am free to interpret it that way but that was not what he was saying. He would not write a cease order to the Deans. He said these changes were put in place to deal with the budget shortfall in academic affairs not because of the over-leveraging on the two projects. I wouldn't buy it. Finally he said that because everyone from his team is away, it would be impossible to meet before Labor Day but that we could all meet on Tuesday (9/4) or Wednesday (9/5). He said 9/5 would be better and once we see their presentation we would all understand the reasons why this is happening. We will, really? I doubt it. I said that 9/4 would be better just because. I told him that these actions have destroyed their credibility in the eyes of the union and the faculty. Not a good move as we head into bargaining . . . .

He followed up with a letter to all bargaining unit members dated August 28, 2012, outlining his concerns. (GC Exh. 11.) Eight of those nine concerns were based on Brass' emails to his department faculty. (Tr. 86, 125.)

> While the cat's away the mice will play. While we are all enjoying the last few weeks before returning to begin the fall semester, the Administration has been busy. Without any consultation or negotiation with the Union, they have begun to implement new policies which will impact all faculty but especially our part-time faculty. Below are some of the highlights:
>
> 1) . . . .
>
> 2) Minimum enrollment has been raised to seven (7) for nearly all courses.
> 3) Underpopulated sections (below the minimum) are currently being cancelled for both part-time and full-time faculty.
> 4) Part-time faculty who are not on a 3-year contract may lose courses/teaching hours.
>
> . . . .
>
> Though these changes affect all faculty, the impact on our part-time faculty is devastating. They face the loss of hours as well as the potential loss of health benefits, a 3-year contract or worse, a job. . . .
>
> Your Union just found out about this a few days ago and we are looking at every possible angle to stop its implementation. . . .

Simpson and Schultz agreed to meet, along with their teams, on Wednesday, September 5, and to have a private discussion before that, on Monday, September 3, 2012. (GC Exh. 12.) Simpson wrote to Schultz, in pertinent part:

> . . . But I really want to talk to you one-on-one before the meeting on Wednesday. If you are open to it, I would like to talk with you tomorrow. I know it is a holiday, but I think we can make progress in advance of Wednesday if you and me talk. I don't want the meeting on Wednesday to be a "line drawn in the sand" meeting. You and I have made progress over the course of the last year and I don't want our progress to be thwarted. I have information to share with you that can shed light on where we are, but we need to talk. . . .

That discussion occurred on Monday evening, after which Schultz sent an email to his executive board members, who would be attending the Wednesday meeting. (GC Exh. 13.) He advised that the union attorney would not be present on Wednesday since the college's attorney was not coming, and that:

> He [Simpson] had my e-mail to faculty in hand and was quoting from it. I think I got their attention. He referred to it as inflammatory language and that I didn't have the facts. I said that if he had contacted the Union before implementing these changes there may have been no need for the letter. The letter I wrote was on him because he neglected to involve the Union and that I stand behind everything I put in that letter. Anytime you implement policy that affects faculty and you don't involve the Union, you now know what to expect. He asked me about Wednesday's meeting and I said they should treat it as if it was the meeting we should have had a month ago. . . .

Attending the Wednesday meeting for the college were: Simpson; Jay Kennedy, assistant provost; Mac Hisey, CFO; and the three deans. Attending for the Union were: Schultz; Danny Harrington, vice president; Wendy Rolfe, vice president for part-time faculty; Jeff Perry, secretary/treasurer; Will Sylvio, office manager; and Dennis Cecere, Professional Performance faculty representative, and Richard Grudzinski, councilor-at-large. Perry took notes for the Union, summarizing the discussion. (GC Exh. 14; Tr. 100, 156.) Schultz opened the

discussion, distributing a list of nine issues,[24] and stating that the purpose of the meeting was to discuss the changes in course population minimums and course cancellations. (Tr. 100, 160.) He then turned it over to Simpson to respond to the concerns.[25] Simpson again agreed that he should have advised the Union in advance of the policy changes, but felt that there was no violation of the contract. He addressed each of the nine points. He explained that the changes were being made to address budgetary issues, since the college couldn't increase tuition.[26] (Tr. 100, 102–103, 160, 342.) He said that, of 2600 classes offered, 41 were cancelled that semester. Simpson reviewed the number of classes canceled in the prior four semesters (58, 89, 63, and 56, from spring 2012 to fall 2010). He conceded that the part-time faculty may lose hours since they work as needed. He said that since the class maximum sizes cannot be increased, this was the option chosen. He also acknowledged that faculty had been cooperative in accommodating overpopulated classes. The group discussed the college's fiscal challenges and what led to these policy changes. However, no bargaining occurred and no agreement was reached, though the meeting ended amicably. (Tr. 104–105, 341.)

Post Implementation of the Unilateral Change

On October 1, 2012, Simpson sent a "Provost Update" (GC Exh. 24), informing all faculty that, with regard to canceled classes:

> We offered 2600 sections this fall semester and cancelled only 3% of the sections and these were due, in most cases, to low enrollment.[27]

Although 61 classes ran in the fall of 2012, despite not meeting their minimum course populations, 40 or 41 sections were cancelled that were below the minimums. (Tr. 299, 338, 400; R. Exh. 8.) In most instances, when an available faculty member's class was canceled, a replacement class or other campus responsibilities were assigned. (Tr. 111, 406.) However, two part-time faculty members, Lucia and Gorham, did not teach replacement classes in the fall of 2012.[28]

Cowen testified that no courses were canceled solely because the number of students registered fell below the new minimums. (Tr. 200, 203, 239–240.) She stated that only courses with zero registrants were canceled for that reason alone. (Tr. 204, 240.) Classes were canceled for a number of reasons; in some instances, the faculty member may be needed for some other assignment, or may be unavailable for personal reasons. (Tr. 303.) And, as described in the findings of fact, there were a number of factors that were considered when deciding whether to cancel or run a particular class.

The majority of classes canceled during the 2010–2011 and 2011–2012 academic years had student enrollments of two or fewer when they were canceled. Indeed, only 6 of the 275 courses canceled during that 2-year period had more than 4 students enrolled. (GC Exh. 23; Tr. 311–112.)

It is impossible to determine the reasons for most class cancellations, since the college does not maintain records of those reasons, only a record that the class was canceled. (Tr. 199, 203.) While the curriculum committee performs an annual review of the courses offered, canceling a scheduled class due to low registration is not a function of the committee. Rather, the departments monitor classes and the decisions were made on a case-by-case basis, by the chair, the dean, and Academic Scheduling. (Tr. 256, 276.) Classes ran when registration was above and below the course population minimums, and they were canceled when registration was above and below the course population minimums. (Tr. 303.) It is, therefore, unclear what exact role the minimum course populations played in those decisions, although it was one factor.

Unfortunately, the September 5 meeting did little to clarify the situation for the parties. Simpson and the management team merely responded to the list of concerns raised by the Union; the Union confused the change in minimum course populations with the reduction in electives initiative. Simpson testified that he could not respond well to some of the concerns raised since he did not understand what some of the points raised by the Union pertained to, and the Union could not explain the basis for those points, since they came from Brass' emails. (Tr. 341–343.) Simpson was unaware of the source until the trial, and testified that he felt sure that, due to his hitherto excellent relationship with the Union, the matter could have been resolved earlier had that information been disclosed. (Tr. 343.) I suspect that is true, based upon my observations of the parties, but that lack of communication and consequent misunderstanding has brought us here.

III. ISSUES PRESENTED

1. Did Respondent violate the Act by unilaterally making a change that was material, substantial, and significant?

2. Did the Union waive its right to bargain either by contract language or by its conduct during bargaining?

[24] See GC Exh. 11 for those issues. Since the nine issues were based on Brass' emails, certain of the topics pertained specifically to the Professional Education, not the entire college. (Tr. 101.)

[25] In addition to increasing class minimums, the college had also decided to cancel classes before the end of the add/drop period, which was the end of the first week of classes. The administration felt that would give the faculty member whose class was canceled a better opportunity to take a replacement class, while the Union felt that the action was premature since students still had time to sign up for the class. (Tr. 340.) However, that change in policy is not an alleged violation herein.

[26] Whether the change in course population minimums was motivated by budgetary or purely pedagogical considerations is immaterial to my decision.

[27] That is distinct from not meeting course population minimums. Also, the Acting General Counsel noted that 3 percent of 2600 is 78. (Tr. 400.)

[28] At trial, the Acting General Counsel contended that three bargaining unit members had been affected, as far as had been determined at that time. Later, on p. 21 of the Acting General Counsel's brief, that number was reduced to two: Lucia and Gorham. However, the evidence shows that the only faculty member who may have been affected by the change in course population minimums as of the date of the trial was Gorham. Lucia's classes did not even meet the previous minimums. No evidence was presented as to the impact of the change in that policy on any other part-time faculty member although there may have been additional effects in the fall 2013 semester.

IV. DISCUSSION AND ANALYSIS

A. Did Respondent Violate the Act by Unilaterally Making a Change that was Material, Substantial, and Significant?

An employer violates Section 8(a)(5) and (1) of the Act if it change the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). These are mandatory subjects of bargaining if the change has a "material, substantial, and significant" impact on the terms and conditions of bargaining unit members. *Flambeau Airmold Corp.,* 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.,* 281 NLRB 737, 738 (1986); *Carrier Corp*., 319 NLRB 184, 193 (1995), citing *United Technologies Corp*., 278 NLRB 306, 308 (1986); *Peerless Food Products*, 236 NLRB 161 (1978); *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500, 1503 (1962).

Where such unilateral changes take place during the term of a collective-bargaining agreement, the employer must obtain the consent of the Union before it makes such a midterm modification. See *Carrier Corp.,* supra; *NLRB v. Katz,* supra; *St. Agnes Medical Center,* 287 NLRB 242 (1987); *Wisconsin Southern Gas Co.,* 173 NLRB 480 (1968); *Oak Cliff-Golman Baking Co.,* 207 NLRB 1063 1964 (1973), enfd. 505 F.2d 1302 (5th Cir.1977), cert. denied 423 U.S. 826 (1975).

An employer's duty to bargain with the union over mandatory subjects includes a duty to bargain about the effects on employees of a management decision that is not itself subject to the bargaining obligation. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 677, 679–682 (1981); *Litton Business Systems,* 286 NLRB 817, 819–821, 1133–1134 (1987), enfd in relevant part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990), revd. in part on other grounds 501 U.S. 190 (1991); *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1368 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996). In most such situations, "[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [effects] without calling into question the employer's underlying decision. See *Bridon Cordage, Inc.,* 329 NLRB 258 (1999).

The Board has held that "[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if it has no obligation to bargain about the decision itself." *Allison Corp.*, 330 NLRB 1363, 1365 (2000), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Good Samaritan Hospital,* 335 NLRB 901 (2001). The employer has a duty to give preimplementation notice to the union to allow for meaningful effects bargaining. *Allison Corp.*, supra at 1366. It is well settled that Section 8(a)(5) requires effects bargaining to be conducted "in a meaningful manner and at a meaningful time. . . ." *First National Maintenance Corp. v. NLRB*, 452 U.S. at681–682. Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

I find that Respondent had the right to make the management decision to change the course population minimums. However, the potential effects of that decision are material, substantial, and significant—cancellation of classes causing loss of income; changed terms and conditions when a different replacement course was taught. Those are mandatory subjects of bargaining, and Respondent had an obligation to bargain with the Union over those effects. Respondent did not notify the Union of the changes before implementation and refused to bargain or to delay implementation when the Union made those requests.

Respondent's argument that it has the right to make inherently managerial decisions, as it did in this instance, is well taken. It is within its discretion to set course population minimums. However, in this case, the Acting General Counsel does not contend that Respondent was required to bargain about the change in the course population minimums themselves. Rather, the contention is that Respondent was required to bargain about the effects of those changes, as they have the potential to impact the wages and terms and conditions of employment of many of the part-time faculty, which are material, substantial, and significant effects. If a class is canceled for not meeting the course population minimum, the part-time faculty member may not be able to teach a replacement course and would thus lose that income; a replacement course may not have the same number of teaching units, so there would be a difference in income; a replacement course may not be comparable to the class originally scheduled;[29] the individual's 3-year contract or eligibility to obtain a 3-year contract may be jeopardized if s/he does not teach 13.5 hours per semester or 27 hours per academic year; and the individual may lose layoff protection or health benefits.

The college had established minimum course populations for all classes. Those numbers were set when the course was added to the catalog, and ranged from 1 to 10. The college changed those minimums in August 2012, generally increasing the minimums to five or more, depending on the course, except for individual lessons or self-defined classes such as trios or quartets. The Union was not notified of the changes in advance of implementation, but learned of the changes through its members, via email notifications to faculty when the policy change was implemented in August 2012. Simpson refused to bargain when Schultz demanded to bargain about the effects of the new policy, and Simpson refused to delay implementation of the new policy. He merely agreed to confer and explain the reasons for taking the action.

Respondent argues that it had no obligation to engage in effects bargaining because the change in course population minimums was not material, substantial, and significant, but rather, was inconsequential. It asserted that there was no real change in policy and that no one suffered any ill effects. Although the

[29] For example, the replacement course may be more demanding in terms of time spent in preparation and grading. See, e.g., *Kendall College*, 228 NLRB 1083 (1977) (violation found where school unilaterally changed its past practice of consulting with faculty before publishing class schedules).

Board has accepted such a defense where the disputed changes to working conditions constitute only a minimal inconvenience to employees, or are essentially de minimis (see, e.g., *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005)), that defense does not apply here because the effects of this policy change are material, substantial, and significant. The unilateral change to the policy at issue herein has the potential to directly and significantly affect union members' wages and conditions of employment, as cancellation of a course for not meeting that minimum could deprive a part-time faculty member of income for teaching that class if a replacement class were not available or the replacement class had fewer teaching units, as well as make him/her ineligible for a 3-year contract and for health benefits and layoff protection, and may affect the faculty member's terms and conditions of employment, if the class were more demanding as to preparation and grading responsibilities.

Respondent asserted in its brief that "each and every semester Berklee has . . . established and changed course minimums." Respondent also asserted that class population was but one of several factors considered when deciding to cancel a class. It further asserted that many classes continued to be run despite being underpopulated.[30] However, I do not find those arguments persuasive, as discussed below.

It may be true that course population was, in most instances, only one of several considerations when deciding whether to cancel a class, but that argument still concedes that the policy was ***a*** factor and had the potential to be the determining factor. Respondent's argument that this means it is not a unilateral change triggering the duty to bargain is baseless. It was the determining factor in the cancellation of Gorham's class, as discussed above in the findings of fact.

The assertion that minimums were changed on a regular basis is not supported by the record. (R. Exh. 1.) While they were established on a regular basis when new classes were proposed, they were changed only occasionally when some change in the class was proposed. The 2010 "LART sweep" in the Liberal Arts Department is not comparable to the policy change here. (R. Exh. 6; Tr. 271, 272.)

Respondent's position that there was no significant change in policy is belied by Simpson's refusal to delay implementation of the policy as requested by the Union. Further, the various emails between deans, chairs, and faculty (referenced above in the findings of fact) indicate that those individuals considered this a significant change in policy, whether it had an immediate effect on scheduled classes or not.

The fact that many classes were canceled in the fall of 2012, despite having more than the minimum number of students registered is not material. Nor is the fact that 64 classes ran with fewer than the minimum number of students. (Tr. 303.) The fact remains that some classes—at least Gorham's—were affected by the change in course population minimums.

Moreover, as the Acting General Counsel pointed out, a change in policy can constitute an 8(a)(5) violation when only one employee is affected or when the amount of money involved is relatively small. See, e.g., *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004); *Bonnell/Tredegar Industries,* 313 NLRB 789, 790 fn. 5 (1994). Based on this record, one part-time faculty member, Gorham, was adversely affected in the fall of 2012 by the change in policy. There is no evidence that any part-time faculty member was affected in the spring of 2013. It remains to be seen whether any faculty members are affected in the fall of 2013 or thereafter.

Respondent argues that the Union did not request bargaining over course population minimums, since it made no information requests regarding minimum course populations; made no proposals and requested no specific remedy or relief for any faculty members either before or during the September 5 meeting; did not request any further meetings to discuss course population minimums and took no further action to resolve the issue of course population minimums. Given that Schultz' email to Simpson demanding bargaining specifically references the new course population minimums, this argument is rejected as specious. (GC Exh. 8.)

Respondent argues that Berklee did not refuse to bargain but did in fact sit down to bargain with the Union when requested, and that the Union failed to discuss the course population minimum policy at the meeting. This is contrary to the evidence including Simpson's own testimony. Additionally, Schultz testified that he knew from experience that neither side would bargain in the absence of their attorneys, and that testimony was uncontradicted. Since Simpson indicated that the college's attorney was not coming to the September 5 meeting, Schultz saw no reason for the Union's attorney to be present. (Tr. 97.) No bargaining occurred at the September 5 meeting and the Union did not again request bargaining since Simpson had refused to delay implementation and had already implemented the new course population minimums (a fait accompli). (Tr. 108.)

I find that the Union was denied the opportunity to bargain over the effects of the policy change. Since the policy had already been implemented and the Union had requested effects bargaining, the Union was not obligated to continue to request bargaining, since this was a fait accompli; the Union's failure to again request bargaining did not constitute a waiver of the right to bargain. *Bohemian Club,* 351 NLRB 1065, 1067 (2007), citing *Tri-Tech Services*, 340 NLRB 894, 895, 903 (2003); *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

B. Did the Union Waive its Right to Bargain Either by Contract Language or by its Conduct During Bargaining?

The employer has the burden to show that the union "clearly intend[ed], express[ed], and manifest[ed] a conscious relinquishment" of its right to bargain. *United Cable Television Corp*., 296 NLRB 163, 167 (1989); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993); see also *Regal Cinemas, Inc. v. NLRB,* 317 F.3d 300, 314 (D.C. Cir. 2003). Waiver of a statutory bargaining right is not lightly inferred from contractual language, and the employer asserting this waiver bears the burden of establishing that the union has clearly and unmistakably relinquished that right. *Ohio Power Co*., 317 NLRB 135, 136 (1995), citing

[30] Respondent made much of the difference between low population or underpopulation and minimum course populations. I understand the distinction and it does not affect the outcome of this case.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); *American Benefit Corp.,* 354 NLRB 129 (2010); *Provena St. Joseph Medical Center,* 350 NLRB 808, 810–812 (2007); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), enfd. without op. 25 F.3d 1044 (5th Cir. 1994); *Kingsbury, Inc.*, 355 NLRB 1195, 1206 (2010). Rather, there is a presumption that the Union has not abandoned rights guaranteed by the Act. *Pertec Computer*, 284 NLRB 810, 817 (1987). The Board does not construe general management rights and integration clauses as constituting clear, unequivocal, and unmistakable waivers of statutory rights. See *Provena,* supra at 822; *Ohio Power Co.,* supra at 136, citing *Johnson-Bateman Co.,* 295 NLRB 180, 184–185 (1989); *Outboard Marine Corp.,* 307 NLRB 1333, 1338 (1992). Further, the Board has taken the position that the employer has an obligation to bargain over effects even though language in the management-rights clause constitutes a waiver of the union's right to bargain over the decision itself. *Good Samaritan Hospital,* supra.

Respondent argues that the union waived any right to bargain over midterm policy changes by including the "Management Rights" and "Pre-Existing Rights, Privileges or Benefits" (integration or "zipper") clauses in the contract and by its conduct during bargaining. However, I reject those arguments as not supported by established case law.

In this instance, while comprehensive, neither the management rights nor the integration clause makes reference to course population minimums or the effects of management's unilateral decisions or to the Union's rights to bargain over such effects. Instead, the clauses are general in nature. Respondent contends that those clauses, read together, demonstrate that any subject not specifically included in the contract is an intentional omission. However, the Board has held that such broadly-worded zipper clauses cannot be used as a "sword" to justify a unilateral change without bargaining. *American Benefit Corp,* supra at 18.

Waivers of statutory rights may be established through examination of the parties' bargaining history, but only if the issue has been fully discussed and consciously explored during negotiations and the Union has consciously yielded or clearly and unmistakably waived its interest. *Ohio Power Co.,* supra at 136, citing *Johnson-Bateman Co.,* supra at 185. At trial, Respondent presented numerous past contract proposals and "talking points" in which the Union purportedly had sought to include provisions covering such subjects as the right to engage in midterm negotiations, or cancellation of courses in order to show that the Union had waived inclusion of such in the contract. However, the argument fails. First, it has not been established that the parties in fact negotiated over any of those proposals as required to show they were "fully discussed and consciously explored." Second, some proposals pertained to changing contract language but it is unclear what the original language was since those contracts were not entered into evidence. And third, none of those proposals concerned setting minimum course populations or bargaining about the effects of a change thereto.

I find that the current collective-bargaining agreement does not contain an explicitly stated, clear and unmistakable waiver of the Union's right to engage in effects bargaining over the change in the minimum course population policy. I further find that the parties' bargaining history does not establish that the Union waived its right to bargain over the change in that policy. I therefore find that Respondent has not met its burden of establishing that the Union waived its right to engage in effects bargaining over this unilateral change in policy.

In summary, I find that the Respondent made a unilateral change that is material, substantial, and significant and that the Union did not waive its statutory right to bargain over the effects of that change. I conclude that Respondent's conduct violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to afford the Union prior notice and an opportunity to bargain over the effects of its decision to change the minimum course population policy in August 2012, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Make-whole relief is not appropriate in effects bargaining cases. See *Fast Food Merchandisers, Inc.*, 291 NLRB 897, 899–902 (1988). The standard remedy in effects bargaining cases is a limited make-whole *Transmarine* remedy, as clarified in *Melody Toyota*. *Transmarine Navigation Corp.,* 170 NLRB 389 (1968); *Melody Toyota*, 325 NLRB 846 (1998); *Rochester Gas & Electric Corp.,* 355 NLRB 507, 508 (2010); *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), petition for cert. filed 81 U.S.L.W. 3566 (U.S. Mar. 28, 2013) (No. 12-1178); *Stevens International, Inc.*, 337 NLRB 143, 144 (2001). A *Transmarine* remedy requires an employer to bargain over the effects of its decision and to provide employees with limited backpay from 5 days after the date of the decision until the occurrence of one of four specified conditions. See *Transmarine*, supra at 390.

The purpose of accompanying the order to bargain with a limited backpay remedy is two-fold: it is "designed both to make whole the employees for losses suffered as a result of the violation and to recreate, in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Transmarine*, supra at 390. Making employees whole is the lesser consideration of the two. "Secondly, and more importantly, the *Transmarine* and other similar 8(a)(5) remedies are designed to restore at least some economic inducement for an employer to bargain as the law requires." *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). This recognizes that, in these cases, the employees represented by the union have already

been affected, and the urgency of the situation triggering the bargaining obligation has passed.

Effects bargaining cases typically involve an employer's failure to bargain over the effects of closing a facility, mass layoffs, or otherwise removing bargaining unit work. However, a *Transmarine*-type remedy may be ordered when a unilateral change does not result in a loss of jobs but otherwise causes economic losses to unit employees. Thus, in *Rochester Gas & Electric*, above, the Board found appropriate a *Transmarine*-type remedy where the employer had made a unilateral change in the vehicle benefit that it afforded employees, resulting in increased commuting costs. Likewise, in *Good Samaritan Hospital,* above*,* a *Transmarine*-type remedy was appropriate where the employer modified the number of employees assigned to work on a given shift. In *Live Oak Skilled Care & Manor,* 300 NLRB 1040, 1041–1042 (1990), the employer failed to notify and bargain with the union over the effects of its decision to transfer ownership of its hospital.

Here, Respondent violated its obligation to provide the Union with prior notice and an opportunity to engage in timely bargaining about the effects of its decision to increase the minimum course populations, potentially affecting the income of certain employees in the bargaining unit (the part-time faculty). Respondent's unfair labor practice thus deprived the Union of "an opportunity to bargain . . . at a time . . . when such bargaining would have been meaningful in easing the hardship on employees" whose income was being cut. *Transmarine*, supra at 389. Had Respondent engaged in timely effects bargaining, the Union may have been able to secure additional benefits for affected employees. See *Live Oak Skilled Care & Manor,* 300 NLRB at1042 (1990) ("[I]t is reasonable to require that 'the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequences thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place'"). It would be pure speculation to try to ascertain the result that timely effects bargaining would have produced. Further, in *Transmarine*, the Board recognized that, in these circumstances, merely ordering Respondent to engage in effects bargaining would be a pro forma remedy. Because Respondent has implemented the policy change and thus relieved whatever pressures motivated it to do so, "meaningful bargaining cannot be assured without restoring some measure of bargaining power to the Union in relation to the issue." *Rochester Gas*, supra at 508.

Therefore, I will order that Respondent bargain with the Berklee Faculty Union, on request, over the effects of its decision to change the course population minimum policy.

Further, I will order a limited backpay remedy designed to make any affected bargaining unit members whole for any losses they suffered as a result of Respondent's failure to bargain about the effects of its decision to increase the course population minimums. Specifically, for each affected bargaining unit member, Respondent shall pay backpay at the rate of their normal wages from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with the Union about the effects of the change to the minimum course population policy; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. However, in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages. See *Smurfit-Stone Contractor Enterprises*, 357 NLRB No. 144, slip op. at 5–6 (2011) (citing *Transmarine Navigation Corp.*, supra).

Backpay shall be based on the earnings that the affected employees would normally have received during the applicable period, and shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards covering more than 1 calendar year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

Respondent, Berklee College of Music, located in Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify the Berklee Faculty Union and afford it an opportunity to bargain over the effects of the new course population minimum policy beginning in August 2012.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union concerning the effects of the increase in course population minimums and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make whole its employees for any losses they may have suffered as a consequence of Respondent's refusal to bargain over the effects of its decision to increase course population minimums, as set forth in the remedy section of this decision.

(c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Boston, Massachusetts, copies of the attached notice. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about August 15, 2012.

(e) Within 21 days after service by the Respondent, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 20, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT make changes in your wages, hours, or working conditions without first notifying and bargaining with the Berklee Faculty Union, American Federation of Teachers, Local 4412, AFT-MA, AFL–CIO (the Union), as the sole and exclusive bargaining representative of our employees covered by the 2010–2013 collective-bargaining agreement between the Union and Berklee College of Music, over the effects of such changes.

WE WILL NOT refuse to bargain in good faith with the Union over the effects of our increase in course population minimums on bargaining unit employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL bargain with the Union over the effects of our decision to increase course population minimums.

WE WILL make all affected bargaining unit employees whole as set forth in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

BERKLEE COLLEGE OF MUSIC